HOE THEAN SUN & ANOR *a*

v.

LIM TEE KENG

HIGH COURT MALAYA, ALOR SETAR *b*
KN SEGARA J
[CIVIL SUIT NO: 22-117-1994]
21 JUNE 1998

TORT: *Defamation - Police Report - Allegation of fraud - Whether defamatory - Whether necessary to prove actual malice - Qualified privilege* *c*

TORT: *Defamation - Defences - Qualified privilege - Presumed malice - Actual malice - Statements made in police report - Whether privileged - Effect of public policy considerations*

The plaintiffs sued the defendant in relation to allegations contained in a police report (‘the report’) made by the defendant. The first plaintiff was an advocate and solicitor practising in partnership with the second plaintiff under the name and style of Hoe & Ahmad Zaki. The defendant was a shareholder in a company called Sey Hoe Sdn Bhd (‘the company’). Lim Chin Teik was the managing director (‘the MD’) of the company. *d* *e*

The first plaintiff had acted as the solicitor in a transaction involving the sale of shares in MGR Corporation (‘the shares’) by the company to the MD and took his instructions from the MD. The report alleged fraud on the part of the MD and that the first plaintiff had wrongfully parted with the shares which had been in his possession. *f*

The defendant testified that he had lodged the report on 1 September 1993, mainly in relation to fraud and criminal breach of trust against the MD, believing the facts to be true at that time. His allegations against the plaintiffs were based on two sale and purchase agreements dated 1 September and 1 November 1992, whereupon he believed the shares were in the plaintiffs’ possession. The particulars in the report were extracts from his affidavit in two civil suits, one of which was against the plaintiffs, which he later lost. The defendant further testified that when he lodged the report, he did not believe the first plaintiff’s denial on 17 March 1993 that the shares had not been lodged with the first plaintiff by the company, and had not been aware of two letters dated 5 January and 20 May 1992 which, together with the first plaintiff’s denial, might have convinced him otherwise. He said that he did not show the report to any third party and had not intended to defame anyone. *g* *h* *i*

Held:

[1] A person may make statements about another which are defamatory and untrue on grounds of public policy and convenience, without incurring legal liability, provided the statements are made honestly and without any improper motive. Such statements would be protected by qualified privilege.

[2] When words are published which are both false and defamatory, the law presumes malice on the part of the person who publishes them. However, when the publication takes place under circumstances which create qualified privilege, the presumption of malice is rebutted and the plaintiff has to prove express or actual malice.

[3] Qualified privilege is a defence only to the extent that it throws on the plaintiff the burden of proving actual malice. Once the plaintiff succeeds in doing so, it becomes immaterial that the publication was made on a privileged occasion.

[4] The law clearly recognises that all statements made in a police report are privileged. However, the privilege is qualified and not absolute. In this case, the defendant had clearly published the statements on a privileged occasion, and it was therefore presumed that he published them honestly, believing them to be true, unless there was evidence to the contrary.

[5] The fact that the defendant and other shareholders of the company had filed a civil suit against the plaintiffs tended to negative any malice on the defendant's part and in fact reinforced the defendant's assertion that he sincerely believed the statements were true. The outcome of the suit and the fact that the report was not withdrawn even after the defendant lost his case against the plaintiffs were irrelevant to the issue of malice at the time the statements were made.

[6] The plaintiffs had failed to discharge the onus of proving malice as there was neither intrisic nor extraneous evidence of actual malice on the defendant's part. The defence of qualified privilege had to succeed.

[Plaintiffs' claim dismissed with costs.]

Case referred to:
Horrocks v. Lowe [1975] AC 135 ***(foll)***

For the plaintiff - George John; M/s George John & Co
For the defendant - John Khoo; M/s Ismail, Khoo & Assoc

Reported by Anne Khoo

JUDGMENT

KN Segara J:

The plaintiff's cause of action in defamation arises from certain statements appearing in a police report made on 1 September 1993 by the defendant. The defendant is a director and shareholder of Sey Hoe Sdn. Bhd. The collective equity ownership of the defendant, together with his brothers and Alor Janggus Soon Seng Sdn. Bhd., in Sey Hoe Sdn. Bhd. is 43.75% (according to the report).

The 1st plaintiff is an advocate & solicitor practising under the name of Hoe & Ahmad Zaki, in partnership with the 2nd plaintiff.

The 1st plaintiff is furious over the police report because the defendant has made groundless allegations that the 1st plaintiff has parted with 682,500 original share certificates in MGR Corporation, belonging to Sey Hoe Sdn. Bhd., to Lim Chin Teik, the managing director of Sey Hoe Sdn. Bhd.

Lim Chin Teik is a friend of the 1st plaintiff. The 1st plaintiff was acting as the solicitor for the vendor, Sey Hoe Sdn. Bhd., and prepared the sale and purchase agreement of the shares set out in the agreement dated 1 September 1992 (p. 1, Bundle B) and the supplemental agreement dated 1 November 1992 (p. 5, Bundle B). The 1st plaintiff only took instructions from Lim Chin Teik.

On 1 April 1993, the defendant had obtained an *ex parte* injunction in the Penang High Court civil suit no. 22-109-93 to restrain Sey Hoe Sdn. Bhd. from transferring the shares referred to in the sale and purchase agreement dated 1 September 1992. The injunction was set aside on 2 April 1993 but reinstated by the Supreme Court in Supreme Court civil appeal no. 02-569-93 on 5 May 1994, and an early trial ordered.

The 1st plaintiff knew a police report had been lodged by the defendant when one D.S.P. Lim Cha Boh asked him to go to the Alor Setar police H.Q. because he wanted to record a statement from him. In the course of giving the police statement in October 1993, the police report was referred to him and he read the whole report. The 1st plaintiff agreed in cross-examination that most of the particulars of fraud in the report referred to Lim Chin Teik. It is a six page report (p. 2, Bundle A).

The 2nd plaintiff was informed by the 1st plaintiff, his partner, that a police report had been lodged against the 1st plaintiff and the firm. The 2nd plaintiff was aware that there were police investigations over the report as he was informed about it by the 1st plaintiff. The 2nd plaintiff said that he had read the report. He assumed that the report had been applied for by the 1st plaintiff.

He testified there were 21 paragraphs and the majority of the paragraphs dealt with allegations of fraud by the managing director, Lim Chin Teik. In respect of the specific allegations against his partner and the firm, he testified the allegations were false.

The defendant testified he lodged the police report on 1 September 1993 at Bukit Aman, K.L. He said his report was basically against the managing director of Sey Hoe Sdn. Bhd. and the particulars of fraud and criminal breach of trust were made against Lim Chin Teik. He believed the facts stated in the report were true at the time he lodged the report. DSP Lim Cha Boh interviewed him and took a statement from him. The defendant did not show the report to any third party. When he lodged the report he did not intend to defame anybody. Under cross-examination, he confirmed the particulars in the report were extracts from his affidavit in the two civil suits in the Penang High Court, c.s. no: 22-109-93 and c.s. no: 22-169-93. He testified that when he lodged the report in September 1993, he had evidence that the vendor had lodged the original certificates with the 1st plaintiff, as required under cl. 5 of the sale and purchase agreement. He further testified that when he lodged the report in September 1993, he still did not believe what Mr. Hoe (the 1st plaintiff) had told him on 17 March 1993 – ie, that the original shares had not been lodged with him by the vendor. When he lodged the report he honestly believed there was a criminal act committed by the managing director.

The defendant also testified that when he said in his report:

> peguam Hoe Thean Sun mesti menyimpan saham-saham asal MGR Corporation

> Hoe Thean Sun membenarkan saham asal MGR Corporation diambil oleh Lim Chin Teik,

his basis was the two sale and purchase agreements dated 1 September 1992 and 1 November 1992. Likewise, when he said in his report,

> peguam harus menyimpan saham asal

he testified that the basis for the statement were the two agreements and that he honestly believed that his statements were true.

There are occasions upon which, on grounds of public policy and convenience, a person may, without incurring legal liability, make statements about another which are defamatory and infact untrue. On such occasions a man, stating what he believes to be the truth about another, is protected in so doing, provided the statement is made honestly and without any indirect and improper motive. These occasions are called occasions of qualified privilege.

When words are published which are both false and defamatory, the law presumes malice on the part of the person who publishes them. However, when the publication takes place under circumstances which create qualified privilege the presumption of malice is rebutted by the privilege and the plaintiff has to prove express or actual malice on the part of the person responsible for the publication to defeat the privilege.

Qualified privilege is a defence only to the extent it throws on the plaintiff the burden of proving express malice. Once the plaintiff succeeds in doing this it becomes immaterial that the publication was on a privileged occasion.

The law clearly recognises that all statements made in a police report are statements made on a privileged occasion. However, the privilege is qualified and not absolute. The primary purpose of a police report is to set in motion the investigation of an offence and bring to justice the offender and perpetrators, if any, at the conclusion of the investigation by the appropriate authorities.

The onus lies on the plaintiff to prove malice and not the defendant to prove his *bona fides* or absence of malice. When the occasion is privileged the *bona fides* of the defendant is always presumed. In this case, there is no doubt that, in law, the defendant published the defamatory statements on a privileged occasion. It is, therefor, to be assumed that he published it honestly, believing his statements to be true, unless there is some evidence to the contrary, for example, that the defendant was fully apprised of the letter dated 20 May 1992 (p. 10, Bundle B) and the letter dated 5 November 1992 (p. 11, Bundle B) at any time before he lodged his report. The fact that the defendant had been informed by the 1st plaintiff on 17 March 1993 that the MGR shares had not been deposited with him and that he had also informed the defendants solicitors by letter dated 7 April 1993 (p. 14, Bundle B) and letter dated 12 April 1993 (p. 1, Bundle A) that the original share certificates were never in his possession, cannot establish malice without the further evidence that the defendant was fully aware of the letter dated 20 May 1992 (p. 10, Bundle B) and letter dated 5 January 1992 (p. 11, Bundle B), coupled with the fact that the said letters had been brought to his attention (before he made the report) either by Sey Hoe Sdn. Bhd. or the plaintiffs themselves, in support of the claim that the shares were never in fact in the possession of the 1st plaintiff at any time after the sale and purchase agreement had been executed.

The fact that the defendant, together with the other shareholders of Sey Hoe Sdn. Bhd., had filed a civil suit against the plaintiffs in the Penang High Court (civil suit no. 22-169-93) tends to negative any malice on the part of the defendant and in fact re-inforces the defendant's assertion that he sincerely believed the statements in the report were true.

In the final analysis, for the purpose of determining malice at the time the report was made, it is irrelevant whether the defendant succeeded in his suit against the plaintiffs at the Penang High Court (civil suit no: 22-169-93). The fact he instituted the suit is clear evidence of *bona fides* on his part. The fact that the defendant has not withdrawn the police report to-date, even after he lost his case against the plaintiffs in the Penang High Court civil suit no. 22-169-93, is totally irrelevant to the issue of malice at the time the statements were made in the police report. The plaintiffs have failed to discharge the onus to prove malice. There is neither intrinsic nor extraneous evidence of actual malice in this case. The defence of qualified privilege must succeed. It is important to remind ourselves of what Lord Diplock said in *Horrocks v. Lowe* ([1975] AC 135 at 150):

> Judges and juries should, however, be very slow to draw the inference that a defendant was so far actuated by improper motives as to deprive him of the protection of the privilege unless they are satisfied that he did not believe that what he said or wrote was true or that he was indifferent to its truth or falsity. The motives with which human beings act are mixed. They find it difficult to hate the sin but love the sinner. Qualified privilege would be illusory, and the public interest that it is meant to serve defeated, if the protection which it affords were lost merely because a person, although acting in compliance with a duty or in protection of a legitimate interest, disliked the person whom he defamed or was indignant at what he believed to be that person's conduct and welcomed the opportunity of exposing it. It is only where his desire to comply with the relevant duty or to protect the relevant interest plays no significant part in his motives for publishing what he believes to be true that "express malice" can properly be found.
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> There may be evidence of the defendant's conduct upon occasions other than that protected by the privilege which justify the inference that upon the privileged occasion too his dominant motive in publishing what he did was personal spite or some other improper motive, even although he believed it to be true. But where, as in the instant case, conduct extraneous to the privileged occasion itself is not relied on, and the only evidence of improper motive is the content of the defamatory matter itself or the steps taken by the defendant to verify its accuracy, there is only one exception to the rule that in order to succeed the plaintiff must show affirmatively that the defendant did not believe it to be true or was indifferent to its truth or falsity. Juries should be instructed and judges should remind themselves that this burden of affirmative proof is not one that is lightly satisfied.
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> The exception is where what is published incorporates defamatory matter that is not really necessary to the fulfillment of the particular duty or the protection of the particular interest upon which the privilege is founded. Logically it might be said that such irrelevant matter falls outside the privilege altogether. But if this were so it would involve the application by the court of an objective test

of relevance to every part of the defamatory matter published on the privileged occasion; whereas, as everyone knows, ordinary human beings vary in their ability to distinguish that which is logically relevant from that which is not and few, apart from lawyers, have had any training which qualifies them to do so. So the protection afforded by the privilege would be illusory if it were lost in respect of any defamatory matter which upon logical analysis could be shown to be irrelevant to the fulfillment of the duty or the protection of the right upon which the privilege was founded. As Lord Dunedin pointed out in *Adam v. Ward* [1917] AC 309, 326 – 327 the proper rule as respects irrelevant defamatory matter incorporated in a statement made on a privileged occasion is to treat it as one of the factors to be taken into consideration in deciding whether, in all the circumstances, an inference that the defendant was actuated by express malice can properly be drawn. As regards irrelevant matter the test is not whether it is logically relevant but whether, in all the circumstances, it can be inferred that the defendant either did not believe it to be true or, though believing it to be true, realised that it had nothing to do with the particular duty or interest on which the privilege was based, but nevertheless seized the opportunity to drag in irrelevant defamatory matter to vent his personal spite, or for some other improper motive. Here, too, judges and juries should be slow to draw this inference.

The plaintiff's claim is dismissed with costs.